SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. [redacted] 155

JOSEPH O. ABRAMSON, and
SHIRLEY RITA ABRAMSON,

Petitioners,

versus

COLONIAL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Joseph O. Abramson and Shirley Rita Abramson, pray that a Writ of Certiorari issue to review the judgment and decision of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The summary judgment of the United States District Court for the Middle District of Florida, entered May 5, 1967 (R. 38-39), does not appear to be reported in Fed. Supp. (Appendix A) The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 390 F.2d 873 (1968) and was entered March 13, 1968, (certified copy attached to record; also contained in Appendix A.)

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth District was entered March 13, 1968 (Appendix pp. 16-17). The jurisdiction of the Court is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED

Whether a Florida corporation engaged in supplying at wholesale, petroleum products to independent dealers, is engaged solely in intrastate commerce, thereby depriving the Federal Courts from granting relief from discrimination by the Florida corporation, by selling petroleum products of like grade in quality to other service stations in the same area at lower prices, thereby lessening competition and injuring petitioners' business in violation of the Robinson-Patman Act, 15 U.S.C.A. §13(a).

STATEMENT

Petitioners are residents of Orlando, Florida. Respondent, a Florida Corporation, is engaged in the business of supplying petroleum products in wholesale quantities to independent dealers and in selling petroleum products at retail through service stations operated by it. (R. 38) On January 3, 1959, petitioners and respondent entered into a sales agreement for the sale and purchase of petroleum products. (R. 38)

From 1957 through 1965, respondent supplied retail outlets in the Orlando area, including that owned and

operated by petitioners, with petroleum products which it purchased under contract from Pure Oil Company's storage facilities located in Tampa, Port Everglades, and Jacksonville, Florida. The petroleum products were delivered to the outlets by respondent's trucks. Commencing January 1, 1966, the petroleum products were purchased from Sinclair Refining Company at its storage facilities in Tampa, Florida. (R. 35-37)

Petitioner filed suit. Responding to the complaint and summons, respondent filed a motion to dismiss. Pursuant to the order granting the motion, petitioner filed an amended complaint claiming relief under the Robinson-Patman Act, 15 U.S.C. §13(a). The amended complaint alleged that respondent "is a Florida corporation . . . doing business as petroleum products distributors, such business being interstate commerce, in that petroluem products involved in this case are distributed in the State of Florida but produced outside the State of Florida and in the other states of the United States." It was further alleged that respondent directly and indirectly discriminated against petitioners by selling petroleum products to other Orlando dealers similarly situated to petitioners at a lower price. As a result, petitioners were unable to enjoy the same profit margin as the other Orlando dealers. Furthermore, petitioners were required to sell at higher prices than the other dealers selling petroleum products purchased from respondent. (R. 3-8) Respondent answered the amended complaint generally denying the allegations, alleging a lack of jurisdiction and specifically denying the fact that

respondent was engaged in interstate commerce. (R. 8-11)

Petitioners and respondent filed motions for summary judgment. (R. 34-37) After a hearing on the motions, the Trial Court entered an order denying petitioners motion and granting respondents motion. (R. 38-40) The order provides in part:

> The jurisdiction of the Court in this action is based upon plaintiffs' allegation in their amended complaint that their claim for relief arises under the Robinson-Patman Act. 14 U.S.C. §13(a). But, the Robinson-Patman Act applies only to transactions occurring in interstate commerce. *Jones v. Metzger Dairies, Inc.* (5th Cir. 1964), 334 F. 2d 919; *Willard Dairy Corporation v. National Dairy Products Corporation* (6th Cir. 1962), 309 F. 2d 943, cert den. (1963), 373 U.S. 934, 83 S. Ct. 1534, 10 L. Ed. 2d 691; *Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corporation* (W.D. Mich. 1965), 243 F. Supp. 331, *affirmed* per curiam by the United States Court of Appeals for the Sixth Circuit in opinion dated January 11, 1967, 1967 Trade Cases, para. 71, 976, CCH: *Lewis v. Shell Oil Co.* (N. D. Ill. 1943), 50 F. Supp. 547; *Myers v. Shell Oil Co.* (S.D. Cal. 1951) 96 F. Supp. 670. The transactions complained of by plaintiffs did not occur in interstate commerce, but were entirely intrastate in nature, and plaintiff, therefore, have no cause of action under the Robinson-Patman Act. (R. 39)

The summary judgment of the District Court was appealed to the United States Court of Appeals for the Fifth Circuit and that Court by decision and opinion dated March 13, 1968, affirmed the summary judgment of the District Court saying, in part:

> Both parties filed motions for summary judgment, and it is now undisputed in the record that during the period in question all outlets in the Orlando area which were supplied with petroleum products by Colonial, including the Abramsons' service station, were supplied with *petroleum products which were purchased by Colonial within the State of Florida.* Thus, the acts complained of did not occur in interstate commerce within the meaning of this statute, and this case is controlled by *Jones v. Metzger Dairies, Inc.*, 334 F. 2d 919 (5 Cir. 1964). See, also, *Fruitbasket, Inc. v. Albertsons, Inc.*, 383 F. 2d 785 (10 Cir. 1967).

REASONS FOR GRANTING THE WRIT

It is believed that this may be the most important case coming before this Court in years concerning the rights of millions of small businessmen whose rights are sought to be protected under the Robinson-Patman Act, 15 U.S.C. §13(a). The Act prohibits discrimination "within the United States". The Courts have heretofore given the Act a very strict interpretation as to jurisdiction, while giving a very liberal interpretation to other federal acts on the matter of jurisdiction.

This Court speaking through Mr. Chief Justice Warren took a giant and historic step forward in the liberal construction of the Robinson-Patman Act in the very recent case of *F. T. C. v. Fred Myer, Inc.*, decided March 18, 1968, and reported in the Advance Sheet of April 1, 1968, as 88 S. Ct. Rep. 904. In that case Mr. Chief Justice Warren said:

> "We cannot, in the absence of an unmistakable directive construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

It is time for construction to be given the Robinson-Patman Act that will afford its protection to all of the small businessmen "within the United States" that Congress intended to give such protection. If Joe Abramson refused to serve a customer of his service station by reason of race, he could be hailed before the federal courts for trial and there would be no question of jurisdiction. If the truck driver driving the tank wagon from Tampa to Orlando to deliver gasoline to Joe Abramson had not been paid in accordance with the Fair Labor Standards Act, the respondent could be hailed before the federal court for violation of the Fair Labor Standards Act. However, we find the very odd situation that under the ruling of the federal courts, Joe Abramson is selling the gasoline which the customer could have recourse to the federal courts for the refusal of Joe to sell to him, or the truck driver delivering the gasoline to Joe would be entitled to complain to the federal courts for violation of the Fair Labor Standards Act, but, Joe Abramson, the man most

vitally concerned, is told that the federal court has no jurisdiction of the discrimination against him.

The sole question for this Court is whether or not petitioners have a claim for relief under the Robinson-Patman Act, 15 U.S.C. §13(a).

The Act provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities or like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

Petitioners do not take issue with the determination by the Trial Court that in order to have a claim under the Robinson-Patman Act the transaction involved must be within the scope of interstate commerce. They do, however, take issue with the finding that the

transactions which provide the basis of this action were not within the scope of interstate commerce.

An analysis of the Fair Labor Standards Act, 29 U.S.C. §201 et. seq., the Robinson-Patman Act, 15 U.S.C. 13(a) and the Civil Rights Act of 1964, 42 U.S.C. §2000 will reveal that the construction of each is different. However, the application of different standards and definitions to the term "interstate commerce" creates a disparity in the interpretation of our statutes. Petitioners are not asking that this Court give greater amplitude to the compass of transactions forming a part of and being called "interstate commerce." They only desire to be afforded the jurisdictional protection of the Robinson-Patman Act.

As this Court recognized in *Shreveport Macaroni Manufacturing Company v. F. T. C.*, 321 F. 2d 404, 408 (5th Cir. 1963),

> The purpose of the (Robinson-Patman) Act was to protect small merchants from discriminatory practices at the hands of manufacturers or suppliers favoring large purchasers.

In *Fleming v. Rex Oil & Gas Co.*, 42 F. Supp. 950, 951 (W. D. Mich. 1941), the Court held that certain employees were engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, notwithstanding the fact that the employer sold all of the oil which it produced within a given state. The Court felt that the employees were entitled to the benefits of the Act because the employer

knew or had reason to believe that substantial portions of oil and products refined therefrom would move in interstate commerce. See *United States v. Darby*, 312 U.S. 100 (1941).

In *Zehring v. Brown Materials*, 48 F. Supp. 740, 745 (S.D. Calif. 1943), the Court said that oil is a commodity of interstate commerce.

In *Divine v. Levy*, 39 F. Supp. 44, 48 (W.D. La. 1941), the Court was faced with the question as to what point oil entered interstate commerce. Although this case deals with the application of the Fair Labor Standards Act, its determination of the point at which oil enters the scope of interstate commerce is applicable to our situation. In the *Divine* case, the Court said, at page 48, that interstate commerce began when the crude oil, through the effort of the laborer, first moved in the pores of the restraining sand stratum.

The *Divine* case stands for the proposition that "interstate commerce" under the Fair Labor Standards Act should be liberally construed. The Court found its premise in *National Labor Relations Board v. Jones and Laughlin Steel Corp.* 301 U. S. 1, 31 (1937) in which the Supreme Court stated:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that com-

merce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Petitioners contend that when dealing with the Robinson-Patman Act, the Courts should give the same liberal interpretation to "interstate commerce" that they have given the term under the Fair Labor Standards Act.

The passage of the Civil Rights Act of 1964 and the rendition of *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) has caused lunch counters to come within the scope of interstate commerce because they offered to serve interstate travelers.

To hold that the transactions involved do not come within the scope of interstate commerce required that the Trial Court determine that the petroleum products came to rest within the State of Florida and that subsequent sales to local retailers was purely intrastate in nature. The petroleum products which petitioners purchased from appellee never came to rest within the State of Florida. As the record indicates, the subject petroleum products were purchased by respondent from Pure Oil Company's storage facilities and were transported to retailers, such as petitioners, by trucks belonging to respondent. At no time did the petroleum products ever come to rest nor were they ever taken from the stream of interstate commerce. Petroleum products are, by their very nature, intended for use in the stream of commerce.

In *Alabama Independent Service Station Ass'n, Inc. v. Shell Petroleum Corporation,* 28 F. Supp. 386, 390 (N.D. Ala. 1939), the court, considering a situation quite similar to ours, said:

> We consider the acts alleged to have been done by the defendants to be in interstate commerce directly. Giving full effect to the affidavits, depositions and answers to interrogatories of the several defendants, the net effect of the argument of the defendants is that because the sales to the tire company defendants were made from local stocks of gasoline, the sales were purely intrastate in character. But more than just this is involved. The plaintiffs allege that there is no gasoline produced in Alabama, and that the regular supply of gasoline to the tire companies by the oil companies requires shipments from out of the state, and that the oil companies do so ship the gasoline from out of the state. In this aspect, the local storage plants and sales therefrom by the oil companies "are but a throat through which the current flows***. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character", to use some of the language of *Stafford V. Wallace,* 1922, 258 U.S. 495, 42 S. Ct. 397, 402, 66 L. Ed. 735, 23 A.L.R. 229, spoken with reference to the question whether sales in stockyards in the course of shipment of stock from one place to another in a different state are a part of interstate

> commerce. Such local sales may affect the power of the state to levy taxes (see *Swift & Company v. United States,* 1905, 196 U.S. 375, 400, 25 S. Ct. 276, 49 L. Ed. 518) or the applicability of intrastate freight rates *(Atlantic Coast Line R. Co. v. Standard Oil Company,* 1927, 275 U.S. 257, 48 S. Ct. 107, 72 L. Ed. 270), but do not necessarily stop the applicability of the anti-trust laws, which seem intended to govern interstate commerce in its furthest reaches, even though some of those furthest reaches could have, if treated separately, been left to the states to deal with as purely local matters. Local storage tanks here were mere conduits and temporary resting points for a subject of interstate commerce. See also *United Shoe Machinery Corp. v. United States,* 1922, 258 U.S. 451, 42 S. Ct. 363, 66 L. Ed. 708. We believe, therefore, that the alleged acts of the defendants are in interstate commerce within the terms of the statute.

By finding that the particular acts and transactions were without the scope of the interstate commerce thwarts the very purpose of the Robinson-Patman Act.

The question presented is of great importance to the millions of small businessmen throughout the United States and to the economy of the United States.

CONCLUSION

This Court should grant the writ of certiorari and quash the judgments of the Court of Appeals for the Fifth Circuit, and the United States District Court for the Middle District of Florida, and remand the case to the District Court for further proceedings, so that the petitioners and all others in like manner situated may have the broad protection of the Robinson-Patman Act as intended by the Congress of the United States of America.

Respectfully submitted,

Walter Warren

Of WARREN & WARREN
212 North 4th Street
Leesburg, Florida
ATTORNEYS FOR
PETITIONERS

CERTIFICATE OF SERVICE

It is hereby certified that service of copies of this Petition for Writ of Certiorari have been made on opposing counsel, Messrs. Samuel Kassewitz, A. H. Rothstein, and C. Harris Dittmar of Bedell, Bedell, Dittmar & Smith, by mail in accordance with the rules of the United States Supreme Court.

Dated this 28th day of June, 1968.

Walter Warren

Of WARREN & WARREN
Attorneys for Petitioners

APPENDIX A.

Summary Judgment

(Number and Title Omitted) (Filed May 5, 1967)

This matter came before the Court on plaintiffs' motion for summary judgment and on defendant's motion for summary judgment. The Court has considered the memoranda and oral arguments submitted by the parties in support of and in opposition to those motions, and, it appears to the Court that the pleadings, depositions, answers to interrogatories, admissions and affidavits on file show that there is no genuine issue as to the following facts established by the record:

1. Plaintiffs are residents of Orlando, Orange County, Florida, and during the years covered by the complaint have owned and operated a service station located at 5629 Edgewater Drive, Orlando, Florida.

2. From January 3, 1959, to date, plaintiffs have purchased petroleum products from defendant pursuant to a sales agreement entered into by the parties on January 3, 1959.

3. The defendant is a Florida corporation, having its principal place of business in Jacksonville, Florida, engaged in the business of supplying petroleum products in wholesale quantities to independent dealers and in selling petroleum products at retail through service stations operated by defendant.

4. Throughout the period of time from January 3, 1959, through date, all petroleum products supplied by defendant to dealer accounts and company-owned stations in the Orlando area have been purchased by defendant within the State of Florida.

The jurisdiction of the Court in this action is based upon plaintiffs' allegation in their amended complaint that their claim for relief arises under the Robinson-Patman Act. 15 U.S.C. §13(a). But, the Robinson-Patman Act applies only to transactions occurring in interstate commerce. *Jones* v. *Metzger Dairies, Inc.* (5th Cir. 1964), 334 F. 2d 919; *Willard Dairy Corporation* v. *National Dairy Products Corporation* (6th Cir. 1962), 309 F. 2d 943, *cert. den.* (1963), 373 U.S. 934, 83 S. Ct. 1534, 10 L.Ed.2d 691; *Cream Crest-Blanding Dairies, Inc.* v. *National Dairy Products Corporation* (W.D. Mich. 1965), 243 F. Supp. 331, *affirmed* per curiam by the United States Court of Appeals for the Sixth Circuit in opinion dated January 11, 1967, 1967 Trade Cases, para. 71,976, CCH: *Lewis* v. *Shell Oil Co.* (N.D. Ill. 1943), 50 F. Supp. 670. The transactions complained of by plaintiffs did not occur in interstate commerce, but were entirely intrastate in nature, and plaintiff, therefore, have no cause of action under the Robinson-Patman Act.

Accordingly, defendant is entitled to judgment as a matter of law, and it is therefore,

ORDERED:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendant's motion for summary judgment is granted and final judgment is hereby entered for defendant, Colonial Oil Company, against the plaintiffs, Joseph O. Abramson and Shirley Rita Abramson, his wife, and said defendant shall have and recover of the plaintiffs its taxable costs herein.

DONE AND ORDERED in chambers at Jacksonville, Florida, this 5th day of May, 1967.

S/ William A. McRae, Jr.
Judge

Copies to counsel

Before BROWN, Chief Judge, CLAYTON, Circuit Judge and SCOTT, District Judge.

PER CURIAM: Appellants, the Abramsons, own and operate a service station in Orlando, Florida. Appellee, Colonial Oil Company, is a Florida corporation engaged in supplying at wholesale petroleum products at retail through service stations operated by Colonial. The Abramsons' suit is bottomed on allegations that they were under contract to purchase petroleum products from the appellee and that during the contract period Colonial discriminated against them by selling petroleum products of like grade and quality to other service stations in the Orlando area at lower prices, thereby lessening competition and injuring appellants'

business in violation of the Robinson-Patman Act, 15 U.S.C.A. §13(a).

Both parties filed motions for summary judgment, and it is now undisputed in the record that during the period in question all outlets in the Orlando area whch were supplied with petroleum products by Colonial, including the Abramsons' service station, were supplied with *petroleum products which were purchased by Colonial within the State of Florida.* Thus, the acts complained of did not occur in interstate commerce within the meaning of this statute, and this case is controlled by *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919 (5 Cir. 1964). See, also, *Fruitbasket, Inc. v. Albertsons, Inc.*, 383 F.2d 785 (10 Cir. 1967).

This case must be and is

AFFIRMED

APPENDIX B

15 U.S.C. §13(a).

The Act provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities or like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .